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No. 07-919

IN THE
Supreme Court of the United States

AMERICAN ISUZU MOTORS, INC., *ET AL.*,

Petitioners,

v.

LUNGISILE NTSEBEZA, *ET AL.*,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF *AMICUS CURIAE* OF HAYWARD D. FISK, WILLIAM GRAHAM, ERNEST T. PATRIKIS, CLIFFORD B. STORMS and ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The individual *amici* have a profound and long-lasting interest in the operations of international trade and commerce. As present and former general counsel for United States-domiciled companies with interests across the globe, they know as well as any that the delicate and protean web of international business relations depend in large measure on the respect that nation states show each other. When a co-ordinate branch of the Government of the United States interferes with the sovereignty of another country, and in doing so also rejects an international consensus established by other sovereigns, the United States is rendered unreliable, untrustworthy and an inconstant international partner. That is what the Second Circuit has done in this case. It has failed to follow the wisdom of a panel of its own, writing eleven years before:

> Comity argues decidedly against the risk of derailing [international] cooperation by the selfish application of our law to circumstances touching more directly upon the interests of another forum. It should be remembered that

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[1] This brief is filed with the written consent of all parties. Counsel for *amici* timely served the ten-day notice required by Rule 37.2(a) on counsel of record for the parties. No counsel for any party authored this brief in whole or in part. Apart from *amici* or their counsel, the Strategic Affairs Committee of The Executive Office of the Government of Dubai made a monetary contribution to the submission or preparation of this brief.

> the interest of the system as a whole – that of promoting a "friendly intercourse between the sovereignties" – also furthers American self-interest, especially where the workings of international trade and commerce are concerned.

In re Maxwell Commc'n Corp., 93 F.3d 1036, 1053 (2d Cir. 1996) (bankruptcy) (citations omitted).

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Ernest T. Patrikis was Senior Vice President and General Counsel of American International Group from 1998 to 2006. Prior to that he served at the Federal Reserve Bank of New York for 30 years, where he was First Vice President, the Bank's second ranking officer, and an alternate member of the Federal Open Market Committee, the Federal Reserve's monetary policymaking group. Mr. Patrikis served as a member of the staff of the President's Working Group on Financial Markets and as a member of the Committee on Payments and Settlement Systems of the G-10 central bank governors; he chaired legal projects for the G-10 central bank of governors and the Basle Committee on Banking Supervision. Mr. Patrikis is currently a partner in a large international law firm, based in New York. Mr. Patrikis is a Vice Chair of the International Practice Section of the New York State Bar Association. Additionally, Mr. Patrikis is a member of the advisory committee of the Business Council for the United Nations, a member of the New York Stock Exchange and the NASDAQ legal and compliance advisory committee and a member of the Council on Foreign Relations.

Clifford B. Storms was Senior Vice President, General Counsel and a member of the board of directors of CPC International Inc. (now Bestfoods) from 1988 to 1997; prior to that he served in various legal capacities with CPV, including Vice President, Legal Affairs and Vice President and General Counsel. He was a member of Advisory Committee,

Parker School of Foreign and Comparative Law, Columbia University. He is also a past president and member of the executive committee of the Association of General Counsel.

Atlantic Legal Foundation is a not-for-profit, non-partisan public interest legal foundation whose mandate includes the advocacy in the courts of principles of the rule of law, limited government, and private enterprise. In pursuit of that mandate, the Foundation served as counsel of record for 28 distinguished former public servants – retired President Gerald R. Ford and former Secretaries of State, Defense, Treasury Commerce, senior members of Congress responsible for United States foreign policy and trade policy, former National Security Advisors, Presidential chiefs of staff, and U. S. Trade Representatives in *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000). The Foundation believes that the rule of law that it advocates is jeopardized by the inconsistent application by United States courts of the core principle of comity, being the modus by which sovereign nation states maintain a system of international relations based on mutual respect.

SUMMARY OF ARGUMENT

In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), this Court's sole case addressing the Alien Tort Clams Act ("ATS"), this Court identified various threshold issues constraining exercise of U.S. court jurisdiction over extraterritorial conduct in order to

limit the destructive impact on international relations such cases invariably risk.

Among these threshold issues, Justice Breyer identified international comity, noting its importance in assuring that "the potentially conflicting laws of different nations will work together in harmony, a matter of increasing importance in an ever more interdependent world" and that "[s]uch consideration is necessary to ensure that ATS litigation does not undermine the very harmony that it was intended to promote." *Id.* at 761 (Breyer, J., concurring in part and concurring in judgment) (internal quotations omitted). Despite the importance of comity in ATS litigation, there is a split among the courts of appeal regarding the appropriate standard for its application that, in itself, warrants the consideration of this Court.

The instant matter presents a paradigmatic case for dismissal on the basis of comity. The Republic of South Africa has expressed its vehement opposition to the continued pendency of this case and called for its dismissal in deference to its programs and policies it has enacted to address the legacy of apartheid and set the democratic future of its nation. By failing to afford the Government of South Africa the deference it is due, the Second Circuit invades the sovereignty of an allied country through the perpetuation of these lawsuits.

The ongoing affront to the sovereignty of South Africa is not the sole basis for a comity dismissal.

The consensus of the community of nations strongly encouraged economic engagement with and in apartheid South Africa in order to encourage reform and peaceful betterment of its people through a policy of "constructive engagement." Plaintiffs may not, *ex ante*, rewrite the controlling law of nations to impose liability for acts the community of nations considered and encouraged at the time. The sovereign actions of the United Kingdom, Germany, Switzerland and others in the European community are entitled to appropriate deference. The courts of this country violate accepted principles of comity by refusing to dismiss this case now.

Also critical among the threshold issues to address, this Court has recognized "the possible collateral consequences of making international rules privately actionable argue for judicial caution." *Id.* at 727. The risk of collateral consequences and "the potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Id.* The majority below, ignoring this admonition, held: "It was error for the district court to consider these collateral consequences in the context of deciding preliminarily whether it had jurisdiction to hear this case under the" ATS. (App. 17a n.12.) The Court of Appeals was wrong: "collateral consequences" of continued adjudication must be considered at the outset, and in this case require the attention of this Court.

ARGUMENT

I. The Continued Pendency of these Actions is Destructive of the Interests Protected by the Doctrine of Comity

A. Importance of the Comity Doctrine and the Circuit Split Over its Application

1. General Principles of Comity

International comity is the long-standing tenet of the Law of Nations limiting "[t]he extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation." *Hilton v. Guyot*, 159 U.S. 113, 163 (1895). The importance of comity to the law of nations has been recognized since the earliest days of the United States: in the absence of comity, "nothing would be more convenient in the promisciuous [*sic*] intercourse and practice of mankind, than that what was valid by the laws of one place, should be rendered of no effect elsewhere, by a diversity of law." *Emory v. Grenough*, 3 U.S. 369, 370 fn (1797) ("By the courtesy of nations, whatever laws are carried into execution, within the limits of any government, are considered as having the same effect every where, so

far as they do not occasion a prejudice to the rights of the other governments, or their citizens.").[2]

Comity is "'the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation.'" *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 454 (2d Cir. 2001) (*quoting Hilton*, 159 U.S. at 164). Under the principles of comity, United States courts "'ordinarily refuse to review acts of foreign governments and defer to proceedings taking place in foreign countries, allowing those acts and proceedings to have extraterritorial effect in the United States.'" *Jota v. Texaco, Inc.*, 157 F.3d 153, 159-60 (2d Cir. 1998).

2. Circuit Split on Comity

The courts of appeal have foundered in providing consistent guidance in how comity is to be applied, even as the United States faces a complex and interrelated world of commerce and geopolitics. The root of this confusion stems from the fact that, as

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[2] The importance of comity to the international legal regime predates the formation of the United States. The doctrine first evolved in Europe from the "obvious need to harmonize the multiplicity of local customs and laws on a more rational basis" resulting from the "progressive development of orderly, centralized government and the expansion of commercial relations" during the twelfth century. Hessel R. Yntema, *The Comity Doctrine*, 65 Mich. L. Rev. 9, 10-16 (1966) (tracing the emergence and significance of the comity doctrine in Western Europe).

applied in different contexts, comity implicates greatly different interests.[3]

In the modern era, this Court has addressed the standards for international comity only in the context of limits on the extraterritorial reach of U.S. regulatory statutes. *See, e.g., Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) (extraterritorial reach of Sherman Act); *see also Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522 (1987) (extraterritorial reach of Federal Rules of Civil Procedure). In such instances, the comity inquiry is more akin to a choice of law analysis. When Congress intended a regulatory law to apply extraterritorially, comity will limit that application only when "'there is in fact a true conflict between domestic and foreign law.'" *Hartford Fire*, 509 U.S. at 798 (further citing Restatement (Third) Foreign Relations Law § 403).

In the absence of more specific guidance from this Court, the Ninth Circuit has adopted the same "actual conflict" and Restatement factors in *all* comity inquiries, even those that do not involve the

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[3] Given the divergent standards as applied in different contexts, Judge Korman termed comity "a doctrine more easily invoked than defined." (App. 93a.) As characterized by another Second Circuit panel, "the doctrine has never been well-defined, leading one scholar to pronounce it 'an amorphous never-never land whose borders are marked by fuzzy lines of politics, courtesy, and good faith.'" *JP Morgan Chase Bank v. Altos Hornos De Mexico, S.A. de C.V.*, 412 F.3d 418, 423 (2d Cir. 2005) (affirming comity dismissal).

extraterritorial application of U.S. regulatory law. *See, e.g., Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1211-12 (9th Cir. 2007) (rehearing *en banc* pending).[4]

Recognizing that the Restatement test is ill-suited for determining appropriate deference to foreign interests in an ATS case, a growing number of circuit courts have articulated alternate standards. In 1996, the Second Circuit, although not in an ATS case, rightly observed that comity "may describe two distinct doctrines: as a cannon of construction, it might shorten the reach of a statute; second, it may be viewed as a discretionary act of deference by a national court to decline to exercise jurisdiction in a case properly adjudicated in a foreign state." *In re Maxwell Commc'n Corp.*, 93

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[4] In *Sarei*, the comity question arose in the context of ATS claims against mining companies asserted by citizens of Papua New Guinea injured by government forces in the course of a ten-year civil war surrounding a mining development. The New Guinea Government, looking to address issues of war and peace within its borders, enacted a "Compensation (Prohibition of Foreign Proceedings) Act" in 1995 prohibiting "the taking or pursuing in foreign courts of legal proceedings in relation to compensation claims arising from mining projects and petroleum projects in Papua New Guinea." Although the Ninth Circuit held that the District Court did not abuse its discretion in dismissing on the basis of comity, it nonetheless reversed and remanded for further consideration of the issue. 487 F.3d at 1211-12, n.22 (further noting that "whether the presence of a conflict is a predicate inquiry, or simply one factor in a multipart inquiry, is academic here, as the district court did not abuse its discretion in identifying a conflict").

F.3d at 1047 (noting that in the context there presented, conflicting bankruptcy regimes, the distinction was academic).

The Eleventh Circuit recently found in an ATS case that comity can be applied either "retrospectively" or "prospectively." *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238 (11th Cir. 2004). "When applied retrospectively, domestic courts consider whether to respect the judgment of a foreign tribunal or to defer to parallel foreign proceedings." Yet, "[w]hen applied prospectively, domestic courts consider whether to dismiss or stay a domestic action based on the interests of our government, the foreign government and the international community in resolving the dispute in a foreign forum." *Id.* (affirming comity dismissal in deference to a German extra-judicial remedy for WWII-era claims arising out of Nazi persecution). In 2006, also in an ATS case, the Second Circuit expressly rejected the Restatement-derived test regarding comity: "That test is used to determine whether a court should apply United States law extraterritorially, but that is not in issue here. Rather, the only issue of international comity properly raised here is whether adjudication of this case by a United States court would offend 'amicable working relationships' with Egypt." *Bigio v. Coca-*

Cola Co., 448 F.3d 176, 178 (2d Cir. 2006) (citations omitted), *cert. denied*, 175 S. Ct. 1842 (2007).[5]

In light of this circuit split and the increase in unmanageably-large class action suits in U.S. federal courts seeking to challenge exclusively foreign conduct – conduct best addressed by, and in many instances already actively being addressed by, those foreign sovereigns directly affected – persons, entities and governments around the world would benefit greatly from guidance regarding this critical threshold issue.[6] Nor is this merely one of those conflicts which, arising naturally through the operation of geographically diverse circuit courts, can be appreciated as a natural consequence of a federal system where different outcomes in different areas of our country are acceptable. Rather, the audience in these cases is the world, and other nations have a legitimate expectation that the United States, including our courts, will speak with one voice. The sovereignty that foreign nations exercise in addressing matters within their own borders means that unpredictable and sometimes conflicting results issuing from application of

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[5] The Third Circuit, although professing skepticism of the Eleventh Circuit's test for "prospective" comity, recently applied it. *See Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 394-95 (3d Cir. 2006).

[6] *See, e.g.*, Arthur Fergenson and John Merrigan, *"There They Go Again" The Trial Bar's Quest for the Next Litigation Bonanza*, BRIEFLY..., Vol. 11, No. 1 (National Legal Center for the Public Interest, Wash., D.C.), Jan. 2007.

divergent standards by U.S. courts diminishes the standing and respect for the United States in the international community. It is imperative that this Court establish consistent principles of comity and resolve the circuit split.

B. The Continued Pendency of These Actions Constitutes an Affront to the Ongoing Efforts by South Africa to Define its Future and Address Apartheid's Legacy

This case presents exactly the issue at the root of the emerging circuit split: international comity deference to ongoing judicial and other remedies adopted by a foreign sovereign to address defining issues of national importance. In no instance is the need for judicial deference on the basis of comity more imperative than when a sovereign nation has taken responsibility for issues within its borders and implemented ongoing programs to address the needs of its own citizens:

> To permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly "imperil the amicable relations between governments and vex the peace of nations."

In re Nazi Era Cases Against German Defendants Litig., 129 F. Supp. 2d 370, 387-88 (D.N.J. 2001)

(*quoting Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 303 (1918)).

The democratically-elected government of South Africa, with the overwhelming mandate of its people, is actively addressing the legacy of apartheid. Nothing could be more central to South Africa defining its own future as a nation. In direct and unyielding terms, South Africa's most senior governmental officials, in *fora* ranging from the proceedings below to debate in South Africa's own National Assembly, have stated that the continued pendency of these lawsuits in the United States is directly contrary to, and destructive of, their reconciliation efforts. The South African people have fought and sacrificed beyond measure – through the ravages of colonialism and apartheid – for the freedom to chart their own future.

By failing to embrace immediately the comity to which the Republic of South Africa is entitled and instead permitting these cases to continue, an affront on that country's sovereignty, the Second Circuit perpetuates the very harms comity would prevent.

1. South Africa's Interest in Addressing the Legacy of Apartheid Free From U.S. Judicial Intervention

South Africa's interest in defining its own future free from foreign interference is eloquently set forth in the record. As explained in the sworn declaration

of South Africa's Minister of Justice and Constitutional Development, the two post-apartheid governments of South Africa, "both elected by an overwhelming majority of the population," were chosen to lead based on a "programme of thorough socio-economic transformation aimed at redressing the legacy of apartheid."[7] This program, the declaration explains, is based on ongoing legislative reforms to effect a "fundamental transformation of South African society" (App. 301a) based on "principles of reconciliation, reconstruction, reparation and goodwill" while deliberately eschewing "'victor's justice'" and "Nuremberg-style apartheid trials and any ensuing litigation." (App. 299a.)

The Government of South Africa in its *amicus* filing before the Second Circuit concluded: "These foreign litigations fundamentally interfere with South Africa's independence and sovereignty and intervene in its internal affairs, including its right under international law to address its apartheid past and to develop policies for its future in the manner it deems most appropriate." (App. 290a.) "It is the South African Government, not a foreign court, that is responsible for these matters, particularly the

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[7] (Statement of Brigitte Sylvia Mabandla, Minister of Justice and Constitutional Development of the Republic of South Africa, Oct. 13, 2005, App. 304a) (*quoting* Decl. of Penuell Mpapa Maduna, Minister of Justice and Constitutional Development of the Republic of South Africa, sworn to July 11, 2003)).

future well-being of the nation, and that must answer to the people for its policies." (*Id.* at 291a.)

Most recently, on November 8, 2007, the President of South Africa, Thabo Mbeki, specifically addressed the Second Circuit's decision at issue in this case in open debate before the South African National Assembly. Reiterating his government's position, President Mbeki stated that it is "completely unacceptable that matters that [are] central to the future of our country should be adjudicated upon in foreign courts which [bear] no responsibility for the wellbeing of our country and the observance of the perspective contained in our Constitution on the promotion of national reconciliation." (App. 312a-13a.) He further explained that, by opposing these lawsuits, "[w]hat we are defending is the sovereign right of the people of South Africa to decide their future." (App. 316a.)[8]

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[8] The decision of the Government to oppose these lawsuits – "litigation which not only sought to impose liability and damages on corporate South Africa but which, in effect, sought to set up claimants as a surrogate government" – was the subject of extensive discussion at the Cabinet committee level in 2003, following which the Government resolved: "It remains the right of the government to define and finalise issues of reparations, both nationally and internationally. . . [I]t is imperative for the government to clearly express its views on attempts to undermine South African sovereignty through actions such as the reparations lawsuit filed in the United States." (App. 304a-05a.)

2. Courts Have Recognized the Importance of Comity Deference Under Similar Circumstances

Those courts that have confronted this issue recognize the particular importance of comity where, as here, a foreign sovereign enacted comprehensive and exclusive programs for resolving issues of national importance within its borders. *See, e.g., Ungaro-Benages*, 379 F.3d 1227; *Bi v. Union Carbide Chems. & Plastics Co.*, 984 F.2d 582 (2d Cir. 1993); *In re Nazi Era Cases Against German Defendants Litig.*, 129 F. Supp. 2d 370.

In *Ungaro-Benages*, the Eleventh Circuit affirmed the comity dismissal of WWII-era claims arising out of Nazi Germany in deference to a German foundation created as the exclusive forum for such claims on the strength of "the interests of [the U.S.] government, the [German] government and the international community in resolving the dispute in a foreign forum" as well as "the adequacy of the alternate forum." 379 F.3d at 1238.

In *Bi*, the Second Circuit affirmed dismissal of claims regarding the Bhopal, India disaster, finding that "[t]o grant the victims . . . , most of whom are citizens of India, access to our courts when India has set up what it believes to be the most effective method of dealing with a difficult problem would frustrate India's efforts." 984 F.2d at 586.[9] The

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[9] Although not decided on the basis of comity *per se*, the principles articulated by Judge Newman are particularly

Second Circuit rightly stated: "[W]ere we to pass judgment on the validity of India's response to a disaster that occurred within its borders, it would disrupt our relations with that country and frustrate the efforts of the international community to develop methods to deal with problems of this magnitude in the future." *Id.* The Second Circuit further recognized the importance of "deferring to the statute of a democratic country to resolve disputes created by a disaster of mass proportions that occurred within that country" and that "[a]ny challenge appellants may have to the settlement must be made through the legislative or judicial channels that are available in India." *Id.*[10]

3. The Interests of South Africa Warrant Immediate Dismissal on the Basis of Comity

Continuation of this action despite South Africa's strong objections invoking comity perpetuate the very harms the doctrine should prevent.

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applicable to the comity analysis and frequently cited in that context. *See, e.g., Ungaro-Benages*, 379 F.3d at 1238; (App. 94a, 101a-03a (Korman, J., dissenting)).

[10] *See also In re Nazi Era Cases Against German Defendants Litigation*, in which the Federal District Court for the District of New Jersey found that it was "not in a position to question whether the payment structure" of Germany's exclusive foundation for WWII-era claims "is either adequate or legal." 129 F. Supp. 2d at 388. Rather, any such challenge must be made either "by the courts of Germany, or alternatively some challenge might be made through diplomatic channels." *Id.*

Cf. Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., 127 S. Ct. 1184 (2007) (judicial economy poorly served, and primary purpose of *forum non conveniens* doctrine subverted, by delaying dismissal of suit, best addressed elsewhere, for costly and protracted inquiry into personal or subject matter jurisdiction). In circumstances as presented here, "the prudent and just action for a federal court is to abstain from the exercise of jurisdiction." *Ungaro-Benages*, 379 F.3d at 1238 n.13.

The procedural device employed by the Second Circuit to avoid addressing the comity issue – relegating a "full airing of prudential concerns" arising from the invasion of South Africa's sovereignty to a future of motion practice – is a species of legalism that breeds distrust of and ire towards the United States and its legal system abroad. (App. 14a n.8.) President Mbeki quoted directly from Judge Korman's dissent in open debate before the National Assembly:

> "A decision to hear these cases in a US court would reflect the worst sort of judicial imperialism . . . and send the message that the United States does not respect the ability of South African society to administer justice by implying that US courts are better placed to judge the pace and degree of South Africa's national reconciliation." Judge Korman is right.

(App. 317a.) Having cast off the oppression of colonialism and apartheid, it is no surprise that the free government of South Africa would not look kindly on the "judicial imperialism" of the United States.

Given the unequivocal position of the democratically-elected government of South Africa and the operation of its ongoing, society-wide programs to remedy the legacy of apartheid, the choice remains whether to afford South Africa the respect it is due or to continue this case before the courts of our federal system. The doctrine of comity, the important interests of international relations and mutual respect among nations it exists to protect, and the fundamental right of a foreign sovereign to address critical issues of national importance within its own borders free from interference by the U.S. Judiciary, dictate a prompt dismissal.[11]

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[11] In some other case, in which the interests of the United States counseled against dismissal, this could become a more nuanced inquiry. Here, however, where the United States Government has joined in seeking dismissal of this action in deference to the programs and policies of the Government of South Africa (as well as the diplomatic protests and concerns of other interested nations), the decision to dismiss becomes inescapable. (*See, e.g.*, App. 236a-82a, U.S. Government Statement of Interest supporting dismissal of action submitted to United States District Court, Southern District of New York.)

C. Comity Requires Dismissal in Deference to the Considered Cooperation and Laws Among the Community of Nations to Encourage Commerce In and With Apartheid South Africa in Order to Affect Reform Through "Constructive Engagement"

The critical international interests to be protected through exercise of comity in this case go beyond the sovereignty of South Africa and affect our relations with other friendly governments.

In today's ever more connected world, many of the most difficult challenges we face – terrorism, ethnic strife, human trafficking, the narcotics trade – require collective action and innovative cooperation among nations. It is of paramount importance to the United States and the community of nations as a whole to promote and encourage such cooperation. Diplomatic consensus can be delicate and hard-won, and judicial intervention into these webs of consensus infinitely destructive. The insight of the Second Circuit in an earlier case rings true: a U.S. court must not accept jurisdiction to adjudicate claims regarding extraterritorial conduct where it would "frustrate the efforts of the international community to develop methods to deal with problems of this magnitude in the future." *Bi*, 984 F.2d at 586; *see also Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 555 (1987) (noting comity's role in preserving "the systemic value of reciprocal

tolerance and good will") (Blackmun, J. concurring); *In re Maxwell Commc'n Corp.*, 93 F.3d 1036, 1053 (2d Cir. 1996) (comity in the "interest of the system as a whole" and "furthers American self-interest, especially where the workings of international trade and commerce are concerned").

From the 1960s through the fall of the apartheid government of South Africa in the early 1990s, there was intense national and international political debate regarding the appropriate economic policy towards South Africa in order to bring about an end to apartheid. There were compelling and heart-felt arguments on both sides of the debate. But the consensus among Western nations – and the government of each of defendants' home countries, all key allies of the United States – was that continued economic dealings with apartheid South Africa, a policy of "constructive engagement," was the best means of affecting positive change.

The governments of major western democracies not only permitted, but encouraged continued economic ties with South Africa, subject to certain arms embargoes and restrictions on trade in limited goods. For example, "the UK Government adhered to a policy of constructively engaging with South Africa, while employing selective embargoes on nuclear and military co-operation and specific imports and exports, as the most effective means of

effecting change."[12] "German law and policy reflected affirmative decisions not to impose any blanket prohibition on loans to, investments in, or commerce with South Africa"[13] These laws and policies were consistent with those of both other western governments and of the United Nations Security Council:

> Like Germany, these governments and international organizations not only wanted Apartheid to end, but also wanted to avoid (i) worsening the widespread poverty among South Africa's black population; (ii) creating strife and civil war in South Africa; and (iii) losing South Africa as a cold war ally. They wrestled with policy choices to satisfy these sometimes competing goals. Although many states participated in an arms embargo and some eventually implemented limited embargos on certain commodities, these governments and organizations considered and rejected an international

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[12] (Declaration of the Rt. Hon. Lord Robin Renwick of Clifton KCMG, dated 9 July 2003, ¶ 8, submitted as part of the Appendix of Declarations and Cited Public Materials in support of Defendants' Motion to Dismiss, SDNY Docket # 43 ("SDNY App.") A1-13, A00000006.) Lord Renwick, among other things, was the UK Ambassador to South Africa (1987-1991) and Ambassador to the United States (1991-1995).

[13] (Declaration of Rudolph Dolzer, dated 9 July 2003, ¶ 3, SDNY App. A14-30, A00000016.)

> prohibition against companies engaging in business, investment or financial transactions with South Africa or South African companies.[14]

In light of the nearly-universal encouragement of investment in South Africa, Judge Sprizzo below rightly concluded that "under the framework set forth by the Court in *Sosa* . . . doing business in apartheid South Africa is not a violation of international law that would support jurisdiction in federal court under the" ATS. (App. 207a.)

International comity requires deference to laws and policies of nations such as the U.K., Germany and Switzerland, and respect for the successful engagement of the international community to formulate a coherent economic policy towards apartheid South Africa. The future of international cooperation with the United States would be placed in doubt should plaintiffs' decades-later efforts to enact a retroactive boycott suffice to abrogate the controlling international legal regime.

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[14] (*Id.* ¶ 4.) (*See also* Declaration of Mathias-Charles Krafft, dated July 4, 2003, ¶ 5, SDNY App. A31-41, A00000035 ("In Switzerland . . . the appropriate economic policy towards apartheid was the subject of much debate. The prevailing view that emerged . . . was that broad-based economic sanctions would not promote social justice or bring about the peaceful dismantling of apartheid.").) There was a similar debate, with similar outcome, in the U.S. Congress. (*See, e.g.*, United States Department of State, *Report to the Congress on Industrialized Democracies' Relations With and Measures against South Africa* (May 12, 1987), SDNY App. A42.)

II. The Scope of Collateral Consequences Implicated by Continued Adjudication of These Actions Warrants the Considered Attention of This Court

ATS cases are closely followed by the international business community as a bellwether regarding efforts to export massive, contingency-driven U.S. class action litigation to the world.[15]

The expansive exposure to potential ATS actions set by the Second Circuit's ruling establishing aiding and abetting liability places the international business community is an untenable position. On the one hand, a multinational corporation may choose to comply with the official policies of Western democracies to promote economic and social reform in countries through economic engagement, even though those countries may have less than perfect human rights records, and assume the risk of being sued in the United States as a surrogate for foreign actors beyond the jurisdiction of U.S. courts. Or the corporation may choose to avoid economic participation in such countries and, with similar actions from other corporations, effectively cede these markets and political influence to countries that may not be as sensitive as the United States and its allies to the plights of the governed. These

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[15] *See, e.g.*, Joseph G. Finnerty III & John Merrigan, Op-Ed., *Legal Imperialism*, WALL ST. J., Feb. 28, 2007, at A15; Michael D. Goldhaber, *The Death of Alien Tort*, AMER. LAW., July 2006, at 71.

are matters best left, as a matter of constitutional architecture and common sense, to the political branches.

This Court has stated the importance of the political branches' sole authority under the Constitution to determine when and under what conditions to permit commerce with repressive states. *See Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 377 (2000); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). The same is true with respect to U.S. policy toward South Africa.[16]

The Second Circuit's sweeping holding that the ATS universally provides for aiding and abetting liability (with no regard to whether the underlying violation of international law contemplates secondary liability, requires state action, or extends to private actors or corporate entities and without reaching agreement on *any* substantive standards to

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[16] For many decades, United States foreign policy maintained that investment in and commerce with South Africa was critical to bringing about a peaceful end to apartheid, and that withdrawal "would have a dispiriting effect on many of those very people who are working hardest for change. (*See, e.g., U.S. Corporate Activities in South Africa: Hearings and Markup on H.R. 3008, H.R.. 3597, and H.R. 6393 Before the Subcomms. on Int'l Econ. Policy and Trade and on Africa of the H. Comm. on Foreign Affairs*, 97th Cong. 70-71 (1981) (prepared statement) (SDNY App. A182, A00000684-85); *The Anti-Apartheid Act of 1985: Hearings on S. 635 Before the Subcomm. on Int'l and Monetary Policy of the S. Comm. on Banking, Housing, and Urban Affairs*, 99th Cong. 59 (1985) (testimony of Kenneth Dam, Deputy Secretary of State, Department of State) (SDNY App. A190, A00000692).)

guide or limit complaints)[17] opens wide the courthouse doors to a proliferation of global ATS actions challenging conduct limited only by a plaintiffs' imagination.

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[17] (*See, e.g.*, App. 52a, 55a-56a (Katzmann, J. concurring) (rejecting proposition that availability of aiding and abetting liability under ATS must be based on a "norm-by-norm analysis" and holding "a private actor may be held responsible for aiding and abetting [a] violation of a norm that requires state action or action under color of law").)

CONCLUSION

The petition for a writ of certiorari should be granted.

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